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In the Supreme Court of the United States

OCTOBER TERM, 1979

EUGENE A. ZIPERSTEIN AND JOSEPH A. LENTINI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners, Eugene A. Ziperstein and Joseph A. Lentini, (hereafter, defendants) pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The Opinion of the Court of Appeals is reprinted as Appendix A, *infra*.

JURISDICTION

The Opinion of the Court of Appeals was entered on May 22, 1979. Defendant's timely petition for rehearing

en banc was denied on July 11, 1979 (Appendix B, *infra*). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 22(2) of the Rules of this Court.

QUESTIONS PRESENTED FOR REVIEW

1.

The opinion of the Seventh Circuit Court of Appeals misconstrues the evidence regarding the motion to suppress and, therefore, denying defendants' motion to suppress.

2.

The trial court abused its discretion in denying the defendants' motions for a severance from the defendant Wu, and thus the defendants were denied a fair trial.

STATEMENT OF THE CASE

The two defendants, Eugene Ziperstein and Joseph Lentini, were indicted along with eleven co-defendants in a sixty-six count indictment charging conspiracy to commit mail fraud (Count I), mail fraud (Counts Two through Sixty-Four), conspiracy to commit racketeering (Count Sixty-Five) and conspiracy to obtain kickbacks (Count Sixty-Six). The indictment charged violations starting in January, 1963, and arose out of an investigation of a network of medical clinics and pharmacies that served persons who obtained their medical care and pharmaceuticals through the Medicaid Program. This program is funded federally and administered by the Department of Public Aid of the State of Illinois.

All defendants, except William Guthrie who died before trial, pled not guilty. The trial began on April 6, 1977, and ended on June 24, 1977. A judgment of acquittal was entered for John Frantz at the end of the Government's case. The jury found three defendants not guilty—Michael

Wu Win-Peng,[1] Ghanshyan Patel and Gerald Barnes. The defendant Michael Markman was found guilty only on the conspiracy count.

Count Sixty-Six was dismissed by the court on motion of the defendants. The government moved to dismiss 32 counts at the conclusion of its case. The defendants Ziperstein and Lentini were convicted on 33 counts. These counts were Count 1 charging conspiracy, 31 counts of mail fraud, and Count 65.

The defendant Ziperstein was sentenced to 30 months imprisonment and fined $10,000 on Count 1. Sentence was suspended on all other counts and he was placed on probation for two years to run consecutively to Count 1. He is at large on bond.

The defendant Lentini was given a suspended sentence of one year with three years probation and a $1,000 fine. He received a concurrent sentence of three years probation on all other counts.

STATEMENT OF FACTS

The facts, as they apply to each point, are set forth in the body of the brief.

Briefly, the indictment charged the defendants with fraudulent conduct arising out of their ownership and management of various medical clinics and pharmacies. These clinics and pharmacies served individuals entitled to payment of medical and pharmaceutical expenses by Medicaid. The government's evidence showed the abuses amounted to pressure and coercion of doctors and other personnel to prescribe excessive medical tests and drugs without regard to medical necessity, the forgery and alteration of prescription forms, the substitution of generic drugs, and the use of unlicensed doctors.

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[1] Hereafter referred to as Michael Wu.

ISSUES

1.

The opinion of the Seventh Circuit Court of Appeals misconstrues the evidence regarding the motion to suppress and, therefore, denying defendants' motion to suppress

The opinion of the panel bases its approval of the trial court's denial of Ziperstein's motion to suppress upon misconception of the evidence adduced at trial.

The opinion mistakenly found that among the documents introduced into evidence were "prescriptions filled by Eisentraut himself" (Opinion p. 10). This finding was based on an incorrect quotation of part of Eisentraut's testimony. The opinion stated at page 10:

> "Shortly before Eisentraut left the Ziperstein pharmacies at the end of July 1976, Eisentraut called FBI Agent Kelly and told him that he had knowledge and evidence of wrongdoing. Specifically, *he said that on some 'prescriptions [he] had filled* the quantities or integrity had been increased' and that he 'found . . . quite a supply of signed Welfare prescriptions not dated by one or probably three different doctors.'"

The correct quotation of Eisentraut's testimony is:

> "'Well, at that time I had knowledge that prescriptions I had filled, the quantities or integrity had been increased and then I found at 11:35 Saturday night quite a supply of signed Welfare prescriptions not dated by one or probably three different doctors.'"

Among the documents Eisentraut found at 11:35 Saturday night (the documents introduced into evidence), there were no documents which Eisentraut had worked on during the regular course of his business. The documents introduced into evidence were in storage and there was no suggestion

by Eisentraut that he became aware of them during the performance of his duties (Tr. 2737).

As a result of this erroneous view of the evidence, the opinion of the panel concluded at page 12:

> "There is similarly nothing to suggest any impropriety in a pharmacist obtaining control over the records which serve as the basis of his daily activities. This is in clear contrast to the evident improprieties in the cases relied on by the defendant. For instance, in *Knoll Associates, Inc.* v. *FTC,* 397 F.2d 530 (7th Cir., 1968), the documents obtained were apparently not related to the duties of the employee who took them and the court, therefore, repeatedly characterized them as 'stolen'."

Therefore, the first basis of the opinion that "the defendant did not have a legitimate expectation of privacy . . ." (Opinion p. 11) is not based on the true evidence. Therefore, the reasoning set forth in *Knoll Associates, Inc.* v. *FTC,* 397 F.2d 530 (7th Cir., 1968) is applicable since the stored documents here were not related to the duties of the employee who took them and were, therefore, stolen.

The opinion next states:

> "The district court found in this case that Eisentraut gained possession of the documents before contacting the government and that he turned them over without government inducement. We do not understand Ziperstein to challenge these findings." (Proposed Opinion p. 12)

Although Eisentraut found the documents in the clinic storage room at 11:35 Saturday night, he did not remove the documents from the premises of the clinic until July 31, 1976 when he brought them to the assistant U.S. Attorney's office. This taking and removal from the premises did not take place until *after* agent Kelly told Eisentraut

that he should bring the documents to the Federal Building (Tr. 2738).

In answer to the suggestion in the opinion that Ziperstein did not challenge the court's finding that Eisentraut took the documents before the government inducement, we need only look to page 25 of the defendants' Brief. There the statement is made:

> "*Eisentraut acted under the influence of Agent Kelly and Prosecutor Conlon when he made his initial decision and acted thereon in segregating to himself the items that belonged to Eugene Ziperstein.* But for the cooperation Kelly and Conlon extended to Eisentraut, those items would never have found their way into the files of the United States Attorney."

Since the taking and carrying away of the documents occurred after agent Kelly's request, the government was involved in the theft and, therefore, the suppression motion should have been decided on the grounds of *Knoll Associates, Inc., supra,* and *United States* v. *Stein,* 322 F.Supp. 346 (N.D. Ill., 1971). Thus, the opinion's reliance on *Burdeau* v. *McDowell,* 256 U.S. 465 (1921) is misplaced.

For a brilliant analysis of the factors involved when the government indicates it will use stolen evidence against a defendant, we respectfully call this court's attention to *United States* v. *Stein,* 322 F.Supp. 346 (N.D. Ill. 1971). What is so impressive about Judge McGarr's analysis is his understanding of the realities that exist when prosecutor, F.B.I. agents and prospective witnesses/putative defendants negotiate for documentary evidence belonging to third parties.[2]

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[2] Another feature of the *Stein* case is the court's correct ruling—suppression of the evidence—without reference to or reliance on *Gambino, Knoll Associates* or *Burdeau.*

Judge McGarr found that Blaz (analogous to Eisentraut in the instant case) was encouraged to believe that "his cooperation would result in his being left out of the mail fraud indictment the government was working toward." (P. 348). (Four pharmacists were indicted in the instant case; Eisentraut was a pharmacist; Eisentraut knew of the investigation and was concerned about his own involvement). Judge McGarr found no evidence that Blaz was an agent of the government but "there is ample reason to believe that Blaz thought the government would reward him for turning over these records." (P. 348) (Agent Kelly said he was interested in seeing the documents Eisentraut had; Eisentraut wanted to turn them over; Kelly said he should bring them to the Federal Building).

Rejecting mechanical application of any rule of law, Judge McGarr concluded that "Under these circumstances it cannot be said that the government was totally divorced from the situation under which Blaz came into possession of these records." (P. 348). Similarly, there is no way the government can totally divorce itself from the situation under which Eisentraut came into possession of Ziperstein's records on its behalf.

Over fifty years ago, in *Gambino* v. *United States,* 275 U.S. 310 (1927), the Supreme Court held that the government may not rely on wrongfully obtained evidence supplied by one whose relationship to the prosecution is less than an agent but more than a private citizen acting in a purely personal manner. In extending the "silver platter" doctrine of *Silverthorne* v. *United States,* 251 U.S. 385 (1920), Justice Brandeis spoke for a unanimous court in unambiguous terms:

> "The wrongful arrest, search and seizure were made solely on behalf of the United States. The evidence so secured was the foundation for the prosecution and

supplied the only evidence of guilt. It is true that the troopers were not shown to have acted under the directions of the federal officials in making the arrest and seizure. But the rights guaranteed by the Fourth and Fifth Amendments may be invaded as effectively by such co-operation as by the state officers acting under direction of the federal officials. Compare *Silverthorne* v. *United States*, 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319. The prosecution thereupon instituted by the federal authorities was, as conducted, in effect a ratification of the arrest, search, and seizure made by the troopers on behalf of the United States." 275 U.S. 310 at 316-317, 48 S.Ct. 137 at 138.

2.

The trial court abused its discretion in denying the defendants' motions for a severance from the defendant Wu, and thus the defendants were denied a fair trial.

Prior to trial, Wu's counsel told the trial judge that he proposed to enter a partnership with the Government (Tr. 2) so that it, the Government, would have ". . . at its disposal, a bully boy, a fast gun" (Tr. 14). Counsel added that he hoped to prejudice the remaining defendants by his actions (Tr. 19). This was not the first time that the court, prosecutors or defense counsel had been warned by Wu's counsel. On October 29, 1976, counsel asked the Government to enter a stipulation that a conspiracy had existed and stated to the court ". . . I propose to help the Government as much as I can" (October 29, 1978, R. 16, Tr. 17). These warnings were made good at every stage of the trial. A brief rendition of ten instances follows:

1. The opening statement.

Allen Ziperstein and Robert Fields, both named as unindicted co-conspirators, had been murdered prior to trial; the manner of their deaths had no relevance to the case and

the judge had directed that no mention of their deaths be made by any counsel (Tr. 13). In his opening statement, Oliver sought to evade that ruling by stating:

> "Allen Ziperstein. Well, let's see. In August, I think it was, of 1975, on one day he was alive and happy, and well, and then within a very short period of time he wasn't alive any more. He was dead." (Tr. 90).

Rather than simply stating that his client would take the stand, and with knowledge that it was most likely that Ziperstein and Lentini would not testify, Oliver told the jury:

> "Wu Win-Peng will, of course, take the witness stand and he will testify, as best he can, to the events to which he was a party. He is, in fact, eager to take the witness stand as an innocent man almost invariably is eager to take the witness stand, and probably the more innocent he is the more anxious he is to testify in his own behalf." (Tr. 96).

And for no other reason but to cast the co-defendants in a bad light and with no basis to believe it true, he told the jury:

> "I believe the evidence will show that after the investigation was started in this case by the FBI, and by the United States Attorney's Office, that certain of the defendants went out to prospective witnesses and sought to corrupt their testimony so that evidence brought before the jury would be flagrantly false." (Tr. 96).

2. Robert Wessel — First Witness.

Robert Wessell, a state employee with management responsibilities for the Illinois Medicaid Program generally described benefits and the billing and payment therefor by

the program (Tr. 120-123). He did not mention any defendant by name.

After a few preliminary questions by Oliver, the following occurred in front of the jury:[3]

"By Mr. Oliver:

Q. You kind of consider it a violation, or you would consider it a violation, wouldn't you, if say a pharmacist were to obtain a green card from somebody and then claim to that somebody that he had lost it, and sold it to another pharmacist or another medical center? You would find that a violation, wouldn't you?

A. Yes.

Mr. Smith: Your Honor, unless Mr. Oliver can make an offer of proof that he is going to prove some of these things, I think these questions are improper.

Mr. Nash: Also, I would like to be heard outside the presence of the jury.

The Court: I am not sure he is not talking about establishing whether his client did these things. At this point if he is not talking about them, then I think it is irrelevant.

Mr. Oliver: I can assure your Honor I am not talking about that.

The Court: Then it is irrelevant, Mr. Oliver.

Mr. Oliver: I am simply spelling out the various—

The Court: Then it is irrelevant.

Mr. Oliver: May I finish this? I am spelling out the various kinds of violations, if they are violations, which violations, I understand, occurred in this case and which I expect the evidence will show occurred in this case.

The Court: Mr. Oliver, unless you are prepared to show it, and that is the reason I have made the observation about your being prepared to show it in some form or another—

[3] We cite this incident at length because it is typical. Citation of similar incidents will be radically shortened.

Mr. Oliver: I think the government will show it, but I want to establish early in the game—

The Court: Then, Mr. Oliver—

Mr. Oliver: —that my client is not associated with it.

The Court: Then, Mr. Oliver, it is not proper cross-examination if it doesn't involve what you are going to show. Then, it seems to me—

Mr. Oliver: Judge, how do you know what I am trying to show?

The Court: I just asked you.

Mr. Oliver: Well, I don't think—

The Court: I asked if you intended to show it, and you said no, you didn't.

Mr. Oliver: I do not intend to be the profferor of that evidence. I expect that evidence to be proffered. I intend to tie it in now.

The Court: Then I think, Mr. Oliver, the questions are improper from you if you don't intend to establish that evidence.

Mr. Oliver: You mean evidence that is put in by other parties to this lawsuit, is not evidence of which I can take advantage? Is that what you are holding?

The Court: Mr. Oliver, unless you are prepared—you know very well because you have been around long enough to know, that you may not ask questions which suggest conduct which is a violation of the law, unless you are prepared to establish from evidence that you have available to you, and from witnesses you are going to call, that that conduct has taken place.

Mr. Oliver: I don't think that is the law at all. If your Honor wants to rule that that is the law of this case, I of course, will abide your Honor's ruling.

The Court: Mr. Oliver, I will be happy to have you show me some cases which say you may cross-examine irresponsibly, without any liability for presenting evidence in support of your cross-examination questions, and the inferences therefrom, simply because you think somebody els 's evidence may establish this.

There are a lot of cases which say you have the duty when you—

Mr. Oliver: I think there is not one case that says that if I anticipate someone else is going to present such evidence in this Court—

The Court: On the contrary, Mr. Oliver. You may not ask cross-examination questions or direct examination questions imputing a violation of the law to somebody other than your own client if you do not intend to establish it from evidence available to you. You are in no position now to say that this will be established by other people, and you have no right to ask questions unless you are prepared to represent that you will present evidence to substantiate the questions that you are asking and the inferences which you are suggesting.

I am prepared to have you show me some cases that say to the contrary because I can show you a lot of cases that say just that.

Mr. Calihan: I renew my motion made at 2:00 o'clock this afternoon out of the presence of the jury.

Mr. Nash: I renew my motion too.

The Court: No. None of this is prejudicial to any defendant. Mr. Oliver is not prepared to say he will represent that he can establish any of these things.

Mr. Oliver: I didn't say I couldn't establish any of them, your Honor. What I am trying to get a ruling on is something very narrow.

Am I to understand your Honor, that I cannot elicit matters on cross-examination which I anticipate will be tied up later in the evidence by evidence offered by other parties to the case?

The Court: That is correct. It is not quite that broad. If you are going to ask questions which suggest misconduct by your client or other people, you may ask them only if you are prepared to represent that you will introduce evidence which will justify the inferences which you seek to draw, or have drawn from the questions which you asked.

Mr. Oliver: I hate to ask your Honor to repeat that, but I still don't quite understand.

Would you mind repeating it, really?

The Court: Mr. Oliver, I will ask the court reporter to repeat it so there will be no question—you come up close so you can hear it. I don't want you to miss it.

Come up close, Mr. Oliver. I don't want you to have any misapprehensions about what I said.

Would you read it to him loud and clear?

(Record read.)

Mr. Oliver: Then I am right. I can't ask things where I assume somebody else's evidence.

The Court: That is correct. If you want to ask prejudicial questions, you have the responsibility of presenting evidence.

Mr. Oliver: Judge, in 25 years I never learned that was the rule. If that is the rule of this case, I will understand it to be the rule of this case.

The Court: Mr. Oliver, I am prepared to have you show me some authority to the contrary. I think you will find none, but I am also educable, and I hope you are too, and you may find if you look it up that I am right.

Mr. Oliver: Well, one of us may not be educable.

The Court: That is your problem, not mine, because I know I am educable. I learn every day.

Any other questions of Mr. Wessell by anybody?'' (Tr. 160-165).

3. Michael Morgan — Second Witness.

The trial judge sustained objections by co-counsel to twenty-three questions asked of the witness by Oliver (Tr. 372-407), most of which had the sole purpose of painting the co-defendant Ziperstein as someone who used a ''patsy'' (Tr. 372, 407) and contrived a scheme to obtain ''kickbacks'' (Tr. 373, 375).

Although the trial judge did little to stop this barrage of unfair and improper questions other than to rule on objections, he did state at one point, ''Nothing in the government's direct was about Mr. Wu'' (Tr. 379). He also

characterized one of Oliver's efforts as a "cutesie performance" (Tr. 397).

One aspect of Oliver's cross-examination was that the trial judge was put in the extraordinary position of having to instruct the jury *at that time* that the insidious inferences Oliver sought to draw from his questions regarding the operation of a small corporation in Illinois were not true (Tr. 411-412).

4. Robert Schmidt — Third Witness.

Robert Schmidt was a physician's assistant who did not identify Michael Wu nor was he asked one question regarding Wu, until Wu's lawyer intruded (Tr. 456-459). He then identified Wu as an occasional attendee at the Thursday night meetings (Tr. 459) and did not mention Wu's name again on direct (Tr. 460-510).

After a lengthy cross-examination of a general nature, Oliver tried to inject the concept of a "quota" on the number of x-rays to be taken at each clinic, although the witness gave neither a description of a quota system or the inference of such (Tr. 519).

The judge then sustained objections to the following questions, the aswers to which could not possibly have any probative value of the defendant and were asked only to prejudice Ziperstein, Lentini and the other defendants:

> "Q. And that decision concerning the number of x-ray pictures to be taken at any particular location was a decision to take those pictures whether or not x-rays were deemed medically desirable as to certain patients, isn't that right?" (Tr. 521)
>
> "Q. And you are aware of the fact, are you not, that indiscrinate (sic) use of x-rays can be quite harmful." (Tr. 522)
>
> "Q. Now is it not the case that over-exposure to x-rays can be physically harmful?" (Tr. 523)

> "Q. Those words "Garfield shuffle" suggest—perhaps you don't intend they should—suggest that people were kind of being shuffled around through that operation, is that right?" (Tr. 525)

A question sure to prejudice defendants and also without benefit to Wu that the Court allowed Oliver to ask was:

> "Q. When they were talking about this matter of certain numbers of x-rays per location, did it ever come up in the discussion: 'But what if people didn't need these x-rays.' Anybody raise that?"
>
> * * *
>
> "The Witness: Not that I recall." (Tr. 522).

5. Bearine Minor — Sixth Witness.

Bearine Minor (Tr. 716-827), a medical lab employee, testified that his laboratory paid a percentage rent to Ziperstein; he made no mention of Oliver's client. On cross-examination, Oliver repeated the direct testimony and made efforts to rehabilitate the witness. He then attempted to elicit testimony of a second possible conspiracy which the court had ruled irrelevant. Finally, Oliver suggested that this witness and Ziperstein knew their rental agreement was illegal by what must be described as thinking out loud as he asked a question:

> "Mr. Oliver: Well, if at the time he (the witness) felt they (rent payments) were illegal, and entered into an agreement—" . . .
>
> "Mr. Smith: I object to that.
>
> "Mr. Mullin: In the presence of the jury.
>
> "Mr. Oliver: It just occurred to me he would be a party in a conspiracy, wouldn't he?" (Tr. 804).

6. Drena Jordan — Ninth Witness.

When Drena Jordan (Tr. 1176-1564) was cross-examined, she was shown to have perjured herself before the grand jury (Tr. 1381-1390, 1553, 1554). Oliver not only at-

tempted to rehabilitate the witness, but attempted to blame Ziperstein for the misconduct of Georgia Cole, a government witness who instructed Jordan to add laboratory tests (Tr. 1556-1557). He asked:

> "And among the other unlawful things that you never wanted to do, was to engage in some nasty fraud of some kind against somebody." (Tr. 1484).
>
> "Am I correct, Mrs. Jordan, in assuming that it was the common understanding, yours included, that Ziperstein was in charge of the whole thing?" (Tr. 1488).

7. Linda Armstrong — Eighteenth Witness.

Although she made no mention of his client, Oliver asked the witness if Ziperstein and Lentini directed the employees to indiscriminately administer harmful x-rays (Tr. 2268). He asked if she knew that x-ray radiation was destructive to human body tissue, and asked if she administered x-rays to patients who did not need x-rays to meet Ziperstein's quota (Tr. 2277). On redirect examination when the witness was questioned about the work Dr. Burgos performed at one of the clinics, Oliver blurted out the statement that the doctor was a "drunk".

8. Diane Neal — Nineteenth Witness.

Oliver's entire cross-examination dwelt upon showing that the clinic patients would be exposed to potential harm if the electrocardiograms administered by the witness were done improperly. He continuously disparaged the abilities of the clinic personnel (Tr. 2334-2349).

9. Arthur Ventura — Twenty-Second Witness.

He was the owner of a medical laboratory which paid rent to Ziperstein based upon a percentage of gross billings. Although he made no reference to Wu, Oliver nevertheless asked him if someone had told him to label the payments as "rent" (Tr. 2501). Oliver characterized rent as somehow being improper (Tr. 2502) and suggested the amount of rent was excessive for the space and personnel services received (Tr. 2512). He pursued this line of questioning despite the fact that the witness denied that the payments were excessive (Tr. 2521-2529).

10. Closing Argument.

In his closing argument, Oliver stated:

> "Mainly, these clinics were places where really bad medicine was practiced, where people who came to get treatment were, in effect, abused, where they were given the wrong kind of drugs, undoubtedly given the wrong kind of treatment.
>
> "To me, anyone who apologizes for that state of affairs, or attempts to support it, stamps himself as a conspirator, knowing what we know." (Tr. 5712).

He characterized Ziperstein and Lentini as guilty of conspiracy (Tr. 5713, 5714) and as "vile and despicable men" (Tr. 5721). He saw no question about their guilt (Tr. 5721).

The opinion of the Seventh Circuit claims that the defense of Wu was not 'mutually antagonistic' to the defenses of Ziperstein and Lentini and thus a severance was not mandated. Wu's gratuitous, and clearly prejudicial, remarks to the jury regarding Ziperstein and Lentini placed a burden on Ziperstein and Lentini which was unnecessary and onerous. It forced them to defend against the Government's allegations as well as those of their co-defendant and alleged co-conspirator, Wu. His mere status as an alleged co-conspirator gave the Government's allegations credibility.

In *Bruton* v. *United States,* 391 U.S. 123, 20 L.Ed.2d 476 (1968), the Supreme Court held that the relief justice required was a severance for one of the defendants because, as Justice Brennan explained:

> ". . . there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." 391 U.S. at 135; 20 L.Ed.2d at 485.

While the instant case does not present the classic Sixth Amendment problem that *Bruton* did, the underlying principle—that certain circumstances make it unfair for defendants to be tried jointly—is common to both cases. The recognition that "concededly clear" limiting instructions can be inadequate to some situations makes the rationale of *Bruton* applicable to the instant case.[4]

More analogous in factual terms to our case is *United States* v. *Johnson,* 478 F.2d 1129 (5th Cir., 1973) in which the Court said of co-defendant's lawyer, "A study of the record reveals that Smith's attorney implicated Johnson at every opportunity" and in which the court characterized Smith as ". . . the government's best witness against Johnson". (P. 1133).

---

[4] Both Rule 14 itself and the language of *Bruton* make it clear that it is the prejudice to the co-defendant and not the *style* of the prejudice which determines whether the severance should be granted. In this respect, the court's attention is directed to *United States* v. *Sacco,* 563 F.2d 552, 555-556 (2nd Cir., 1977), in which it was alleged that the activities during trial of a co-dendant representing himself were of such a prejudicial nature that the appellant should have been given a severance. Although affirming the conviction, it was the *degree* of prejudice and not the source that dictated the court's ruling.

Simply stated, Johnson and Smith had antagonistic defenses of which the Court was made aware before the trial began. Smith's attorney made a case against Johnson in his opening statement. During the trial both Smith's confession and his in-court testimony were directed towards making a case against Johnson. As the Court said:

> "When Smith took the stand, he affirmed his out-of-court statement and also took every available opportunity to further incriminate Johnson as a generally bad person and as the prime mover in the counterfeit transaction." (P. 1133)

In reviewing Johnson's conviction the court recognized that a severance motion is directed to the discretion of the court and that the facts of each case necessarily dictate whether the court has abused its discretion.

The *Johnson* case is analogous to the instant case in another important respect. The proper application of Rule 14 calls for the trial judge to weigh the necessity for a severance as a joint trial progresses. He has a "continuing duty at all stages of the trial to grant a severance if prejudice does appear." *Schaffer* v. *United States,* 362 U.S. 511, 516, 5 L.Ed.2d 921 (1960).

In *Johnson* the appellate court found that the motion for a severance was properly denied before trial. It suggests that even after the opening statement it may not have been clear that a severance should have been granted. However, the court then said:

> "But as the trial progressed, it became clear that the prejudice to Johnson of defending at a joint trial with Smith outweighed any possible disruption in the judicial process which would result from having separate trials." 478 F.2d at 1134.

The Appellate Court found this denial an abuse of discretion, and reversed the defendant's conviction.

We have set forth above the continuing nature of the prejudicial questions and remarks that permeated the appellants' trial. What was forecast by the opening statement came true as Oliver cross-examined each of the government's witnesses. The cumulative effect was devastating. And the warnings, admonitions and instructions of the trial judge did little to minimize that effect.

It is important to note that what counsel sought—initially and as the trial progressed—was to sever Wu from their trial. A separate trial for Wu would have been short and uncomplicated. This comports with one of the criteria in determining whether defendants should be tried jointly or separately. It is true of this case as it was in *Johnson* that a separate trial for Wu ". . . would not have been very time consuming, but entirely practicable." 478 F.2d at 1134.

The precedent relied upon in *Johnson* and quoted therein is the following from *United States* v. *Harris,* 458 F.2d 670, 673 (5th Cir., 1972):

> "In weighing the competing factors under Rule 14 regarding severance, the trial court must evaluate the alleged factual and legal compactness of the consolidated trial and the government's interest in judicial economy with the potential prejudice to any of the defendants."

The potential prejudice complained of by counsel for Ziperstein and Lentini both before and after the opening statements and during the trial was realized when the trial judge again and again refused to sever Wu's trial from that of his co-defendants.

CONCLUSION

For the above stated reasons, petitioners respectfully request that this court grant a Writ of Certiorari to review the judgment of the United States Court of Appeals of the Seventh Circuit.

Respectfully submitted,

RAYMOND J. SMITH
Attorney for Petitioners

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 77-1863, 77-1864, 77-1865, 77-1866 and 77-1867

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EUGENE ZIPERSTEIN, RICHARD PETRIZZI, MARVIN ROSENTHAL, SHUW LING CHANG and JOSEPH LENTINI,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 CR 1049—**Hubert L. Will**, *Judge*.

HEARD FEBRUARY 20, 1979—DECIDED MAY 22, 1979

Before SPRECHER, TONE and WOOD, *Circuit Judges*.

SPRECHER, *Circuit Judge*. The defendants, all of whom were connected with the ownership or operation of so-called Medicaid mills, were convicted of mail fraud, a conspiracy to defraud the United States, and conducting a criminal enterprise affecting interstate commerce. We find that all of the arguments raised by the defendants are without merit and affirm the convictions.

I

The defendants operated twenty-eight medical clinics owned by defendant Ziperstein. These clinics, located in Chicago, Illinois, consisted of a number of facilities

housing offices for doctors, pharmacists and medical support personnel. The Medicare and Medicaid billing by these organizations was handled by two companies, also owned by Ziperstein, which processed the charges and sold them to factoring companies that ultimately collected from the State of Illinois for their own account.

The purpose of the conspiracy, as established at trial, was to increase by fraudulent means the reimbursements received from the Medicaid program. Specifically, the defendants sought to obtain compensation from the government for services which were performed without any arguable justification or necessity. The trial transcript, exceeding 6000 pages, reveals numerous devices engaged in by the defendants to accomplish this end. Only a few of these need to be recounted to clarify the nature of the scheme.

The most notable technique employed by the defendants came to be known as the "Garfield Shuffle" ("Garfield" was the name of one chain of clinics). Patients were sent to one or more doctors for unscheduled examinations which bore no relation to the patient's specific complaint before sending the patient for treatment of that complaint. Likewise, laboratory tests, such as x-rays and blood analyses, as well as prescription drugs, were ordered for patients regardless of medical necessity.

Not only were patients subjected to unnecessary drugs and procedures, but also the clinic employed devices to inflate the billing on all procedures performed. For example, two prescriptions were written where one would have sufficed, thereby resulting in a double, flat-rate "professional fee" for the prescriptions. Additionally, laboratory samples were taken in double amounts for a double charge.

Finally, the clinics billed the state for services that were not even performed. Prescriptions, for instance, were dispensed in amounts lower than that specified on the prescription form but the state was billed for the full amount stated. Many prescriptions were also signed in blank so that employees could later fill in larger amounts.

The evidence presented at trial established that all of the convicted defendants were participants in this scheme. In particular, evidence revealed that the defendants had encouraged or, more accurately, pressured clinic personnel to engage in these practices in order to meet specified production quotas. Eugene Ziperstein, principal owner and chief administrative officer of the clinics was sentenced to 30 months in custody and assessed a $10,000 fine. Petrizzi and Lentini, who were administrators of the clinics, were given sentences of a $1,000 fine, one year in custody, and three years on probation. Rosenthal, another administrator, was given the same sentence as Messrs. Petrizzi and Lentini, but it was suspended on condition that he spend six months on work release and the remainder on probation. Shuw Ling Chang, a supervisor in the pharmacies, was sentenced to three years on probation. Various other defendants were acquitted. The convicted defendants now appeal.

II

All defendants now urge that their trials should have been severed from the trial of Wu Win-Peng, one of the acquitted defendants. Defendants maintain that Wu's defense was mutually antagonistic to that of the other defendants and that Wu's counsel's courtroom behavior prejudiced their defense.

This circuit has a well-established standard for determining when the claim of "mutually antagonistic" defenses will mandate a severance. Such "mutual antagonism" only exists where the acceptance of one party's defense will preclude the acquittal of the other. *United States v. Kahn*, 381 F.2d 824, 841 (7th Cir.), *cert. denied*, 389 U.S. 1015 (1967). *See also United States v. McPartlin*, No. 77-2258, slip op. at 12-13 (7th Cir., Mar. 26, 1979). An example of "mutually antagonistic" defenses is presented in *De Luna v. United States*, 308 F.2d 140 (5th Cir. 1962). In *De Luna* one defendant claimed that he came into possession of narcotics only when the other defendant saw the police approach and shoved the drugs into his hands. The other defendant,

however, denied having ever possessed the drugs and claimed that they had always been in the possession of the first defendant. In a case such as *De Luna*, where someone must have possessed the contraband, and one defendant can only deny his own possession by attributing possession and consequent guilt to the other, the defenses are antagonistic.

This is completely different from a case, such as the one before us where one defendant denied participation in a criminal conspiracy while admitting, gratuitously from the viewpoint of his own defense, the existence of a conspiracy. Such a "non-participatory" defendant can be acquitted even though no conspiracy is ultimately determined to have been in existence. In short, the defendant's non-participation adds nothing to the characterization of the acts in which the other defendants participated. Accordingly in *United States v. Hutul*, 416 F.2d 607 (7th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970), the denial of severance was upheld in a case where one defendant claimed that the misrepresentations with which he was charged were made in reliance on statements made by the other defendants and that therefore he lacked the requisite intent to defraud proscribed by the mail fraud laws. In *Hutul* we noted that this simple antagonism of defenses did not automatically require severance. *Id.* at 620. Certainly the fact of reliance by one defendant does not mandate any finding that the statements by the other defendants were made with the requisite intent to defraud. Similarly, in this case, the alleged non-participation of defendant Wu in any conspiracy did not mandate any conclusion, regardless of Wu's statements to the contrary, that an illegal conspiracy in fact existed.

Of course, even if the nature of the defenses themselves did not require a severance, it is still possible that the defendants could have been prejudiced by the actual conduct of a co-defendant's defense. *See United States v. Sacco*, 563 F.2d 552 (2d Cir. 1977).[1] This ground for

[1] It is on this ground that we distinguish *United States v. Johnson*, 478 F.2d 1129 (5th Cir. 1973), relied on by

(Footnote continued on following page)

severance, however, depends on a careful evaluation of facts elicited, prejudicial tendencies, and the entire course of the trial prior to the challenged conduct. Such determinations are uniquely within the province of the trial court, and accordingly it is well established that a trial court's denial of a motion for severance will be overturned only if it was an abuse of discretion. *United States v. Turner*, 471 F.2d 128, 137 (7th Cir.), *cert. denied*, 409 U.S. 949 (1972). Examining each instance of alleged prejudice we are unable to find any abuse of discretion.

The defendants first allege that undue prejudice resulted from several remarks in Wu's counsel's opening statement. Two unindicted co-conspirators had been murdered before trial. Judge Will determined that the manner of their death was irrelevant to any issue in the trial and directed counsel to make no mention of their deaths. Nevertheless, Oliver, Wu's counsel, made such a reference in his opening statement. However, he did not

[1] *continued*
defendants as supporting the proposition that where one defense, although not mutually antagonistic, tends to implicate the other defendants, severance is required. In *Johnson*, the Fifth Circuit held that the trial court abused its discretion in failing to grant severance of two defendants in a counterfeiting case, one of whom defended on the ground that he believed himself to be acting as a state police informer when he admittedly received the counterfeit bills from his co-defendant and that therefore he lacked the requisite intent. As we have pointed out in the text, mere antagonism is not enough to compel severance. In *Johnson* there was only this antagonism since the jury, even if it believed one of the defendants was an informer, need not by virtue of that also find that the co-defendant in fact passed the bills or knew them to be counterfeit. However, the *Johnson* court did not rely on this conflict alone to justify the necessity of severance and was careful to point out that prejudice occurred in the actual conduct of the defense at trial. The court emphasized that the alleged "informer" took "every available opportunity" to incriminate his co-defendant. Certainly even a defense which was not mutually antagonistic could be asserted in such a way as to prejudice the defendant. However, as the rest of this section demonstrates, we find no such prejudice to have actually occurred in this case.

mention that the deaths were the result of a murder, and thus we fail to see any prejudice. In another remark in his opening statement, Oliver mentioned that his client was going to take the stand, since "an innocent man almost invariably is eager to take the witness stand." Oliver did not speculate as to whether any of the other defendants were going to refuse to take the stand. Accordingly, these statements clearly fit within our holding in *Hutul* that such remarks are merely an attempt to bolster the credibility of the testifying defendant, not to comment prejudicially upon the silence of the others. 416 F.2d at 621-22. *See also United States v. Barney*, 371 F.2d 166 (7th Cir. 1967). Finally, Oliver intimated that certain other defendants had attempted to tamper with witnesses. This statement was not prejudicial because there was a factual foundation to support the statement. The government offered to prove that one witness was approached by defendant Ziperstein who told her to take the Fifth Amendment before the grand jury and pointed out to her that the government could take her children away. *Cf. United States v. Akin*, 562 F.2d 459 (7th Cir. 1977), *cert. denied*, 435 U.S. 933 (1978) (belief that evidence would be adduced at trial sufficient to justify reference in opening statement).

The defendants also argue that Oliver's conduct of the cross-examination of government witnesses resulted in prejudice. The objections need not be specifically detailed since they all possess a common characteristic: each of these questions was allegedly prejudicial because they reiterated some point which the government had already made concerning the conspiracy. For example,[2] Robert Wessel, a state employee for the Illinois Medicaid program was called by the government to describe the state management of the Medicaid program with regard to billing and benefits. In the direct examination the

[2] Defendants Ziperstein and Lentini themselves emphasize the typicality of this example: "We cite this incident at length because it is typical. Citation of similar incidents will be radically shortened." Brief for Defendants Ziperstein and Lentini at 8 n.1.

government asked detailed questions designed to elicit from Mr. Wessel a description of medical services that would not be compensable by Medicaid or would be in violation of applicable regulations. Tr. at 125-29. For example, the following testimony was elicited after the government inquired as to the state's procedure for verifying Medicaid claims:

> Q. Prior to payment for a physician's services, does the Department of Public Aid make any investigation as to whether or not that physician's services were medically necessary?
>
> . . . .
>
> A. No, ma'am.
> Q. Prior to payment does your department make any investigation as to whether the services billed were actually rendered?
> A. No, ma'am.
> Q. Prior to payment for prescriptions, does the Illinois Department of Public Aid verify whether or not the drug or over-the-counter item was actually dispensed?
> A. No, ma'am.
> Q. Or whether the quantities appearing on a prescription were actually dispensed?
>
> . . . .
>
> A. No.
>
> . . . .
>
> Q. Prior to payment do you determine whether or not the pharmacy used a prescription that was presigned in blank by a doctor?
> A. No, ma'am.

Clearly this line of questioning prefigured every violation which the government intended to prove. Likewise Wu's counsel's questions centered on virtually the same types of violations:

> Q. And you just plain don't have the personnel to run out and check everybody, do you?
> A. No, sir.

Q. Your department, I suppose, would have some objection to paying for duplicate treatment on one individual, is that right?

. . . .

A. We would object.

. . . .

Q. But you wouldn't necessarily catch that every time it happened, would you?
A. No, sir.

. . . .

Q. You pay for blood tests made on patients, don't you?
A. Yes, sir, if they are ordered by a physician.
Q. But you are not authorized to pay for testing of employees of various health centers, who are not bona fide patients, are you?
A. If they are not recipients, no, sir.
Q. You folks wouldn't know from looking at the billings that were sent to you, if the doctor prescribed drugs in a certain quantity, and the pharmacist, in fact, delivered drugs in a lesser quantity, you wouldn't know about that, would you?
Mr. Nash: Objection. Irrelevant, your Honor.
The Court: No, overruled.

Mr. Oliver continued, asking questions about the state's policy on forged prescriptions or pharmacists' sales of public aid eligibility cards ("green cards") obtained while filling prescriptions and never returned to proper owners. Co-defendants' counsel objected, arguing that Mr. Oliver had to make an offer of proof as to these incidents. Mr. Oliver declined to offer any such proof himself, arguing that he expected these incidents to be tied into later proof by the government. The court sustained the objections.

It takes a vivid imagination to conceive any possible prejudice to the co-defendants in this colloquy. With the exception of Mr. Oliver's questions as to forged prescriptions and green cards, every matter had been

already addressed or alluded to in the government's direct examination. The government actually offered extensive proof later that prescriptions had been forged. (Tr. 957, 972, 1207-12, 2160-64, 2315-16, 2393-94, 2723-24, 3393-94, 3569-71). Whatever harm accrued to the defendants was the legitimate incrimination which this evidence produced, and we cannot see that the mere reiteration of properly detrimental evidence creates any unfairness proscribed by the Due Process Clause. As to the reference to green cards, it is sufficient to note that the court immediately thereafter sustained defendants' objections, thereby minimizing to acceptable levels any prejudice from such unsubstantiated allegations. An examination of all the remaining allegations of prejudice from Oliver's cross-examination reveals that these allegations rely on the defendants' incorrect theory that reiteration of evidence which the government legitimately produced was detrimental.

Defendants finally claim prejudice from Oliver's closing statement. Again they appear to be complaining only that Oliver was repeating allegations made by the government. Oliver did assert that the clinics were places where "really bad medicine" was practiced and where patients were given wrong drugs and treatments. The record, however, is replete with legitimate and proper evidence that these clinics were staffed by unqualified and unlicensed personnel (Tr. 491, 972, 2817); that unnecessary treatments were prescribed (Tr. 447, 638-40, 698G, 975, 1185, 1970-71, 2008-10, 2089, 2092, 2452, 2775, 3525, and 3544-51); and that needed prescriptions would be underfilled (Tr. 1212). Likewise, calling Ziperstein and Lentini "conspirators" or "vile and despicable men" differed little from the pictures of them painted by the government.

In sum, we cannot say that the defendants have pointed to sufficient incidents of prejudice to mandate a conclusion that they received an unfair trial. Thus, we refuse to set aside the appropriately exercised discretion of the trial court.

III

Defendant Ziperstein argues that the trial court committed error by admitting certain pharmaceutical records showing prescriptions signed in blank, which were turned over to the government by Harlan Eisentraut, a pharmacist in Ziperstein's employ. Ziperstein characterizes these records as "stolen" and argues that alleged government encouragement of this "theft" violated the Fourth Amendment, thereby requiring suppression of these records. Since we do not believe that Ziperstein has correctly characterized the means whereby Eisentraut obtained control over these records, we find no merit in Ziperstein's argument.

The evidence relevant to this argument established that from September 1975 to July 1976 Harlan Eisentraut was employed as a pharmacist in three pharmacies operated by Ziperstein. Shortly before Eisentraut left the Ziperstein pharmacies at the end of July 1976, Eisentraut called FBI Agent Kelly and told him that he had knowledge and evidence of wrongdoing. Specifically, he said that on some "prescriptions [he] had filled, the quantities or integrity had been increased" and that he "found . . . quite a supply of signed Welfare prescriptions not dated by one or probably three different doctors." These documents were in a storage room in the clinic. Agent Kelly expressed an interest in them, and two days later Eisentraut brought the documents to the FBI. Included in the documents were prescriptions filled by Eisentraut himself, prescriptions filled by others before Eisentraut began work in the clinics, and about 200 pre-stamped prescriptions. The FBI directed Eisentraut to return some of the documents which it believed did not indicate any criminal conduct; the remainder of the documents were offered as government exhibits at trial.

The trial court admitted these exhibits over defense objections. The trial court ruling was premised on its findings that Eisentraut gained possession of the documents before his contact with the FBI, that he came into possession of these documents through legitimate means, and that Eisentraut decided to turn over the

documents to the FBI on his own volition without any inducement from the FBI. We affirm this ruling of the trial court on the alternative grounds that the defendant did not have a legitimate expectation of privacy in the documents and that no government participation in the removal of the documents was established. Therefore no Fourth Amendment violation occurred.

It must be initially emphasized that in determining the validity of Ziperstein's Fourth Amendment claim the laws relating to ownership, custody and theft as well as other incidents of property law are not particularly relevant to this inquiry. We are not concerned with determining whether these documents are properly characterized as "stolen." The Fourth Amendment clearly countenances numerous seizures where the items seized are taken without the express consent of the owner. Instead, the Fourth Amendment inquiry focuses on whether the owner had a reasonable expectation of privacy with respect to the seized items. If no such expectation exists, the taking cannot run afoul of the Fourth Amendment.

We do not believe that any such reasonable expectation existed in this case. The Supreme Court recently noted that "[w]hat [employees] observe in their daily functions is undoubtedly beyond the employer's reasonable expectation of privacy," and accordingly employee disclosures were said to be beyond the purview of any Fourth Amendment restraints. *Marshall v. Barlow's Inc.*, 46 U.S.L.W. 4483, 4485 (May 23, 1978). Certainly pharmaceutical prescriptions come within the daily observation of a pharmacist and were beyond any reasonable expectation of privacy which Ziperstein had. An identical result was reached by this circuit in *United States v. Billingsley*, 440 F.2d 823 (7th Cir.), *cert. denied*, 403 U.S. 909 (1971). In *Billingsley*, documents relating to the incorporation of a business entity were removed by one of the corporate officers from the office of one of the convicted defendants. We upheld the government's use of these documents in a mail fraud trial, noting:

> As the then duly elected secretary and treasurer of Trans-American, Gander was entitled to the custody of these materials, and he incorporated them

into the files which he kept on the business. Nothing in the record suggests any impropriety in either the fact of removal or the manner in which it was accomplished.

Id. at 826. There is similarly nothing to suggest any impropriety in a pharmacist obtaining control over the records which serve as the basis of his daily activities. This is in clear contrast to the evident improprieties in the cases relied on by the defendant. For instance, in *Knoll Associates, Inc. v. FTC*, 397 F.2d 530 (7th Cir. 1968), the documents obtained were apparently not related to the duties of the employee who took them and the court, therefore, repeatedly characterized them as "stolen." In *United States v. Stein*, 322 F. Supp. 346 (N.D. Ill. 1971), the documents were obtained by a co-tenant in the defendants' office who never asserted that he had any legitimate access to the documents but only that they had been "abandoned" by the defendants.

Even were we to believe that Eisentraut had no authority to obtain control over the documents and that Ziperstein had a reasonable expectation of privacy with respect to them, we could not grant the motion to surpress. Even where there is evident impropriety involved in obtaining the documents, it still must be determined whether the government was involved in the impropriety. In *Burdeau v. McDowell*, 256 U.S. 465 (1921) private detectives burglarized the defendant's office and blew open a safe at the behest of a former employee of the defendant. The Supreme Court upheld the admission of the documents noting that "the record clearly shows that no official of the Federal Government had anything to do with the wrongful seizure of the petitioner's property." 256 U.S. at 475. The district court found in this case that Eisentraut gained possession of the documents before contacting the government and that he turned them over without government inducement. We do not understand Ziperstein to challenge these findings. Instead he seeks to construe the government's acceptance of the documents as ratification and cooperation in the taking. Such a position does not however accord with *Burdeau*. There the government

accepted documents it knew to have been improperly removed from the defendant's offices and the court clearly held this "participation" to be insufficient to invoke the restraints of the Fourth Amendment. Accordingly, we believe the district court was correct in its denial of Ziperstein's motion to suppress.[3]

IV

Defendants also argue, relying on *Brady v. Maryland*, 373 U.S. 83 (1963), that their Due Process rights were prejudiced by the govenment's alleged concealment of favorable material. This claim originates from the government's direct examination at trial of laboratory personnel who claimed that they had participated in or knew of actions by defendants to increase lab test and pharmacy revenues. One witness, Drena Jordan, testified that she had altered 75 percent of the prescriptions written by doctors in the clinic where she worked. When the defendants objected, the court required the government to produce the altered documents. Upon production of the documents,[4] it became apparent that the 75 percent figure was inaccurate, since only 100-200 prescriptions visibly indicated any alterations, and thus the trial judge instructed the jury to disregard the witness's recollection of the 75 percent alteration figure. Other witnesses testified that they had added un-

[3] We also note that the govenment's use of this evidence can be justified under the Fourth Amendment on a consent theory. In *United States v. Matlock*, 415 U.S. 164 (1974), the court held that one having "joint access or control for most purposes" could consent to a search of the jointly controlled goods or premises. Employees, like Eisentraut, possess sufficient control over items relating to their employment to consent to those searches. *See, e.g., United States v. Piet*, 498 F.2d 178 (7th Cir. 1974) (validating employee consent to search warehouse containing stolen goods).

[4] The original prescriptions were last known to have been in the possession of defendant Ziperstein who, despite the government's subpoena, never produced them. During trial copies of these prescriptions were obtained from one of the clinics and were then made available to the defendants.

necessary tests to laboratory requisition forms. Although not one of the defense attorneys objected to the alteration testimony as it was elicited, the trial judge (apparently on a subsequent suggestion of one of the defense counsel) indicated that he felt that the best evidence rule might require the production of the altered documents. The government responded by saying that these documents would be of no value since the witnesses could not tell from the face of the documents which tests were the added unnecessary ones. The trial court ultimately ruled that although it would not strike the prior testimony, as to which there had been no contemporaneous objections, it would strike any further similar testimony without the introduction of the related documents.

The perimeters of the defendants' *Brady* argument are not entirely clear from their briefs. Certainly there can be no *Brady* claim as to the documents themselves since, except for those in the sole possession of some of the defendants, the government made all of them available to the defendants well before trial. The fact that the government did not introduce them itself at trial does not, as defendants seem to imply, implicate the principles of *Brady* as long as the documents were made available to the defendant. Those documents in the possession of some of the defendants, specifically the pharmaceutical records mentioned in Drena Jordan's testimony, were obtained, and made available to the other defendants, during trial. We reiterate that *Brady* does not require pretrial disclosure. As long as ultimate disclosure is made before it is too late for the defendants to make use of any benefits of the evidence, Due Process is satisfied. *United States v. McPartlin*, No. 77-2258, slip op. at 37-39 (7th Cir., March 26, 1979). Here all witnesses remained available for recall to the stand to be confronted by these documents, a procedure which the defendants declined to follow. No other specific claims of prejudice from the timing of the disclosure is even suggested by the defendants, and indeed it is difficult to imagine what sort of prejudice might have existed.

Another strain of the defendants' argument concerns not the government's disclosure of the laboratory requisition documents themselves but the allegedly inadequate disclosure of extrinsic facts about the documents. The defendants argue that the government did not disclose the fact that these documents would diminish the credibility of the witnesses, specifically that the witnesses had been unable to identify the added tests when shown the documents. Although the damaging character of the laboratory requisition documents is subject to serious question,[5] it is obvious that ultimate disclosure of the possibility that the document would impeach the witnesses was made before the close of the trial. Since the defendants did not attempt to develop themselves any impeaching inferences from the documents, we cannot say that the government's timing of this disclosure caused any prejudice.

V

Defendant Ziperstein also argues that Pepa, a government witness, was permitted to give highly prejudicial, inadmissible testimony. Pepa worked as a physician for six months in 1972 in a medical center which housed a Ziperstein-operated pharmacy. Pepa testified at trial that shortly after he began at the medical center Ziperstein told him that he should write three to four prescriptions per patient and that Pepa should endeavor to write prescriptions for more expensive drugs than might be necessary. Pepa further testified that on one occasion he had signed blank prescriptions at Ziperstein's request.

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[5] The addition of tests to the laboratory requisition forms, unlike the alteration of prescription forms, did not involve making any changes that would be visible on the face of the documents: another test was simply checked off on the form. The fact that witnesses could not recall from seeing such a document, which was merely one of thousands of similar documents, which tests were added by them neither impeaches nor corroborates their recollection that they added unnecessary tests to forms as a regular practice.

On cross-examination, however, Pepa admitted that he had previously told the FBI that he had done nothing wrong while employed by Ziperstein. Before the government's rehabilitation of Pepa on re-direct, the court examined Pepa outside the presence of the jury to determine the reasons for the inconsistency in his statements. Pepa explained that at the time he spoke to the FBI he had been frightened of what Ziperstein would do to him or his family if he told the truth. Pepa substantiated this fear to the court by recounting several threatening incidents. At one time Pepa had warned Ziperstein that he was considering sending his patients to another pharmacy to have their prescriptions filled. Ziperstein responded, stating: "Don't touch those patients. If you do, then God help you." Pepa also testified that after he left his association with Ziperstein, his new office was vandalized and that he believed Ziperstein was responsible. After hearing this testimony, the judge ruled that Pepa could explain to the jury the state of mind which caused him to make the inconsistent statement to the FBI. But the judge also ruled that Pepa should not be permitted to testify as to the reasons for that state of mind—*i.e.*, Pepa could testify that he was afraid of Ziperstein but could not relate the specific incidents that gave rise to those fears.

After this ruling, Pepa returned to the stand, and the following colloquy occurred:

Q. Mr. Pepa, why did you lie to the FBI?
The Court: In 1975?
By Mr. Johnson:
Q. Yes, December, 1975.
A. I was scared.
Q. What were you scared of?
Mr. Smith: I object, your Honor.
By The Witness:
A. I was scared—
The Court: Overruled.
By The Witness:
A. I was scared of the safety of my family.
By Mr. Johnson:
Q. Is there anyone specifically you were scared of?

Mr. Smith: I object.
The Court: Sustained.

The arguments by defendant Ziperstein that he was prejudiced by this interchange border on the frivolous. The defendant argues that this testimony was improper on two grounds. First, Ziperstein contends that the issue of Pepa's fear had only marginal relevance to the case and that any such relevance was outweighed by the prejudice which it would have on Ziperstein. This court has previously held that witnesses may properly avoid the impeaching effect of prior inconsistent statements by testifying that those statements were made in fear of retaliation by the defendant. *United States v. Pritchard*, 458 F.2d 1036 (7th Cir.), *cert. denied*, 407 U.S. 911 (1972). Further, the court sensitively exercised its discretion in limiting the prejudicial effect of this testimony both by prohibiting inquiry into the specific incidents and by giving a limiting instruction to the jury admonishing them to consider the evidence only as proof of Pepa's state of mind and not as proof of any conduct of Ziperstein.

Ziperstein also asserts that he was prejudiced by the prosecutor's question asking Pepa who had frightened him. Ziperstein argues that his question personally linked him to Pepa's fear which the trial judge had ruled impermissible. However, Pepa never testified before the jury that he was afraid of Ziperstein and the objection to this question was sustained before the witness could answer it. Any link between such an unanswered question and any beliefs that the jury had about Ziperstein are simply too tenuous to support a claim of prejudice. Furthermore, even if the jury answered this question in their own minds, the judge had indeed ruled—a ruling supported by *Pritchard*—that the government could establish that Pepa was afraid of Ziperstein. The trial court's ruling only limited the ability of the government to delve into the incidents that served as the basis of that fear. Thus, even if the jury understood this last question as implicating Ziperstein, no impermissible prejudice occurred.

VI

Defendant Ziperstein's final argument is that his conviction cannot stand because it was based on "perjured" testimony. Several clinic employees testified at trial that Ziperstein had pressured them to add unnecessary tests to requisition forms. These employees had previously testified before the Grand Jury that they had not made any such additions or had given other contradictory testimony. Several of these witnesses admitted on the stand that they had lied to the Grand Jury. Building on this factual basis, Ziperstein contends that *Mesarosh v. United States*, 352 U.S. 1 (1956), requires reversal of a conviction where witnesses whose testimony was necessary to prove an element of the offense were shown to have previously given contradictory testimony under oath. Accordingly, Ziperstein argues, his conviction must be reversed.

We think that Ziperstein has clearly misread *Mesarosh*. In *Mesarosh*, a Smith Act prosecution, it was learned before Supreme court review that one witness who had testified at trial had subsequently given wholly contradictory testimony to a legislative committee. The Solicitor General thus admitted that he had reason to doubt the truthfulness of that witness's testimony and, as a result, asked that the Supreme Court remand the case to the trial court for a determination as to the truthfulness of the witness at trial. The Supreme Court declined to remand for such a determination, stating:

> It might be different if we could see in this case any factual issue upon which the District Court, on a remand, could make an unassailable finding that Mazzei's other falsehoods were differentiated from his testimony therein. But it is not within the realm of reason to expect the district judge to determine, as the Government indicated it would ask him to do, that the witness Mazzei testified truthfully in this case in 1953 as an undercover informer concerning the activities of the Communist conspiracy, yet concurrently appeared in the same role in another tribunal and testified falsely—possibly because of a psychiatric condition—about a plan by different members of the Communist conspiracy to assassinate a United States Senator.

352 U.S. at 13. The Court also noted that a remand was not appropriate, since the "district judge is not the proper agency to determine that there was sufficient evidence at the trial, other than that given by Mazzei, to sustain a conviction." *Id.* at 12. It is clear therefore that the Supreme Court believed the trial testimony to be completely discredited and remanded for a trial without the tainted testimony.

The case before us is completely different. In *Mesarosh* the contradictory statements were made after the testimony at trial and no reason appeared in the record which would explain why a witness once having revealed the truth would then subsequently begin to lie. Indeed, where there are conflicting statements, it is most likely that the falsehood should precede the truth. Here the contradictions preceded the trial testimony, and where those contradictions occurred[6] a credible

[6] We have carefully scrutinized the record before us to determine the nature and extent of any conflicting testimony. This examination revealed that a large portion of the defendants' claims of perjury reflect a severe distortion of the record, a distortion which often borders on misrepresentation. For example, the defendant argues that Henrietta Wilkins's testimony was inconsistent in that although she testified on direct that she added unauthorized lab tests to requisition forms, on cross examination she admitted that before the grand jury she had denied "that she ever added lab tests." In fact the record shows that her grand jury testimony was that she added tests "a couple of times" and she stated during cross-examination that she had meant the phrase "figuratively" and thus in a way consistent with her trial testimony. Likewise defendant Ziperstein argues that Ethel Howard had not revealed to the Grand Jury the existence of a conversation about which she testified on direct and the government stipulated this omission before the Grand Jury. In fact the government refused to make such a stipulation, and the record does not otherwise reveal whether Ms. Howard, as she claimed, did in fact communicate the contents of the conversation to the grand jury.

Other "contradictions" cited by the defendant are completely insignificant and may be explained by ambiguities in the cited statements. Mildred Baker's inconsistencies appear to be the product of an understandable confusion between the

(Footnote continued on following page)

explanation for why the witness would have initially lied existed. All witnesses who admitted that they had given previous false statements either to the Grand Jury or to Ziperstein's private investigators explained that they did so to avoid possible retaliation by the defendants either by being fired, physically endangered or otherwise disadvantaged.[7] Additionally, some explained that they feared incriminating themselves by revealing their participation in the fraudulent schemes.[8]

Finally, the *Mesarosh* decision depended on its peculiar facts, and did not impair the general rule that even testimony flatly contradictory of the witness's earlier testimony is evidence which the jury can credit and rely upon. *United States v. Tanner*, 471 F.2d 128, 133, 135-36 (7th Cir. 1972).

[6] *continued*
billing sheets for pharmaceutical products and the prescriptions themselves. Ethel Howard who testified as to the lab quota set by the defendants had told the grand jury that there was no quota but that dollar totals for each day's lab work was always kept at a set level—a contradiction more terminological than substantive. Larry Kelly testified as to the addition of unauthorized tests by lab employees, and his grand jury testimony denying that tests were added appears more to mean that no additions were made where they involved performing additional unauthorized procedures on the patients but would be made only where they involved either taking larger quantities of tested material from patients or subjecting that material to more laboratory analysis. Such a position would be completely consistent with the direct testimony. The same distinction would resolve any contradictions in Dorothy Harman's testimony. Certainly it cannot be said to be unreasonable for the jury to have similarly resolved these apparent contradictions and thereby to have accepted the testimony as credible.

[7] Mary Hunt, Larry Kelly, Drena Jordan and Donne Smith all admitted that their fear of losing their jobs motivated them to give prior false testimony to avoid incriminating their employers. Larry Kelly and Donne Smith expressed fear of violent physical retaliation by Ziperstein. Georgia Cole said she believed that Ziperstein could exercise his influence on the FBI to have her children taken away from her once her participation in the fraud was revealed.

[8] For example, Donne Smith offered this explanation.

VII

Defendant Petrizzi urges that error was committed with respect to the government's treatment of the unindicted co-conspirators. These objections are, at best, inartfully set out thereby leaving ambiguous both the specific actions by the government and the legal theories which underlie the objection. To the extent that we can discern the nature of these objections, however, we find no merit in them.

One basis of the objection seems to be that unindicted co-conspirators, although not named, were allowed to testify as to conversations among themselves which were conducted outside of the presence of the defendants. To the extent that the co-conspirators (all employees of the defendants) testified as to statements of the defendants or other co-conspirators, these statements are within the party admission exception to the hearsay rule. Fed. R. Evid. 801(d)(2)(D), (E). Furthermore, it is well established that co-conspirators need not be indicted, and *a fortiori* need not be named, for the exception to be applicable. *See, e.g., United States v. Durland*, 575 F.2d 1306 (10th Cir. 1978); *United States v. Pope*, 574 F.2d 320 (6th Cir.), *cert. denied*, 436 U.S. 949 (1978); *Joyner v. United States*, 547 F.2d 1199 (4th Cir. 1977). To the extent that the co-conspirators testified as to their own actions and statements this testimony would be admissible and relevant as to other members of the conspiracy. *Glasser v. United States*, 315 U.S. 60 (1941); *Lutwak v. United States*, 344 U.S. 604 (1953). We see no reason to believe, and Petrizzi cites no authority, that naming an unindicted conspirator in the indictment has any effect on the relevancy of that co-conspirator's testimony once the existence of a joint venture is established. Naming the unindicted co-conspirator at most merely conveys a more detailed picture of the government's theory of the conspiracy, and the recent trend of authority has been to subordinate this minor advantage to the greater disadvantage that would accrue to a named but unindicted co-conspirator who must bear the opprobrium of a criminal accusation

without any opportunity to vindicate himself.[9] *United States v. Chadwick*, 556 F.2d 450 (9th Cir. 1977); *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975); *Application of Jordan*, 439 F. Supp. 199 (S.D. W. Va. 1977).

The second basis of the defendant's objection is that the trial court read to the jury the list, prepared by the government, of the unindicted co-conspirators. The theory behind this objection appears to be that the reading of the list "amended" the indictment and prejudiced the defendants by leading the jury to believe that there were more witnesses to the defendants' misdeeds than the government had called. Of course the jury was just as likely to infer that these witnesses were not called because they would not support the government's case. In any event, this objection was not properly preserved since no objection was ever made to the reading of the list.

VIII

Defendants Chang and Rosenthal contend that the government's evidence of use of the mails was insufficient to establish either proof of any violation of the mail fraud statute, 18 U.S.C. § 1341, or to establish venue in the Northern District of Illinois. The evidence presented by the government to show use of the mails centered on the mailing of the fraudulently obtained checks (or "warrants") by the State of Illinois. Glenda Stowers, supervisor of the warrant distribution center in the state comptroller's office, testified that the ordinary practice of her office was to mail checks to those making claims under the Medicaid program. These checks were mailed by stuffing them in an envelope with a golden-colored voucher which showed the same address as printed on the check and could be seen through a window in the envelope. Further, the government

[9] Even this advantage was minimal here since long before trial the government tendered to the defense a list of those persons whom the government considered to be unindicted co-conspirators.

introduced into evidence each original warrant and a copy of the corresponding voucher showing the address. These exhibits were obtained from files in the possession of the State of Illinois. Each warrant bore an indorsement from a recipient in Chicago—either that of a factoring company to whom Ziperstein sold his receivables or that of Ziperstein subsidiaries.

We think the evidence that the warrants were regularly mailed by the State, and that these warrants were indorsed by the addressees, was sufficient to allow a jury to infer that the mails had been used in the distribution of these warrants. Indeed in *United States v. Joyce*, 499 F.2d 9 (7th Cir. 1974), we held that proof of use of the mails could be made out merely by substantiating a regular business practice of mailing the type of document which served as the basis of the fraud allegations. Here the indorsements supply the additional corroborating factor of receipt of the warrants, thereby making it even more likely that the documents were mailed.

The specific deficiencies of proof urged by Chang and Rosenthal do not alter our conclusion. Defendants Chang and Rosenthal first urge that no regular course of business by the State with respect to mailing was ever demonstrated. To support this argument they cite a portion of Glenda Stower's testimony on cross-examination in which she agreed that the receipt of certain documents and the occurrence of certain other events were prerequisites for the ordinary course of business to be followed with respect to a particular warrant. Although the precise nature of these unspecified events and documents was not revealed in Mrs. Stower's testimony, Chang and Rosenthal urge that since it was never shown that these events occurred, there could be no presumption that the warrants were mailed. This argument, however, extracts too much from Stower's testimony on cross-examination. She never stated that these other documents or events were prerequisites to mailing the checks. Indeed on direct she said that the regular course of business was that checks, if delivered at all, were delivered by mail. Thus, at most, Mrs.

Stower's cross-examination responses can only be interpreted to suggest that these other events are prerequisites to authorizing release of the checks. Since the defendants cannot contest that the checks, all of which bear appropriate indorsements, were released for delivery and can only contest that they were delivered by mail, we do not believe that the failure of the government to prove the occurrence of these unspecified prerequisites was material.

Second, defendants claim that the government failed to invoke the presumption that mail is delivered according to the address displayed thereon. There was testimony that the warrants were addressed by placing the voucher for the warrants in the envelope in such a manner that the address on the voucher was displayed through the window on the envelope. Defendants now claim that the government failed to demonstrate what address was on the vouchers for each warrant. This contention is without any conceivable merit—all vouchers were introduced into evidence and they all bore the same address as the corresponding warrants.

Finally, defendants attack minor inconsistencies in the testimony of two witnesses who testified as to receipt of the warrants. However, since we believe that the government met its burden of proving use of the mails by showing the State's regular procedure of mailing warrants and by showing actual receipt of the checks by virtue of their indorsements it was not even necessary to call any witness to testify as to receipt by mail, and thus we feel that these supposed inconsistencies were immaterial.

Defendants' claim that the government did not establish venue in the Northern District of Illinois is similarly without merit. The defendants argue that the government never established that the street addresses to which the warrants were mailed were in Chicago. The addresses, however, all designated Chicago, Illinois, as the city of destination. The defendants' claim, thus, at most becomes a claim that the specific street addresses may be non-existent. We think that fact would be irrelevant in establishing venue where the letters were

destined for Chicago and, if deliverable at all, were deliverable there. In any event, since this objection was not raised until after the government completed its case, it was waived. *United States v. Fabric Garment Co.*, 262 F.2d 631 (2d Cir. 1958).[10]

AFFIRMED

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Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[10] Rosenthal's attack on the count 65 racketeering conviction was limited to its dependence on the mail fraud convictions. Since we have upheld the latter, the former stands as well.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
July 11, 1979

Before

Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Nos. 77-1863, 77-1864, 77-1865, 77-1866 and 77-1867

vs.

EUGENE ZIPERSTEIN, JOSEPH LENTINI, RICHARD PETRIZZI, MARVIN ROSENTHAL and SHUW LING CHANG,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 CR 1049
HUBERT L. WILL, *Judge*.

ORDER

On consideration of the petitions for rehearing and suggestions for rehearing *in banc* filed in the above-entitled cause by the defendants-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petitions for rehearing be, and the same are hereby, DENIED.

Supreme Court, U. S.
FILED
DEC 15 1979
MICHAEL RODAK, JR., CLERK

No. 79-218

In the Supreme Court of the United States

OCTOBER TERM, 1979

EUGENE A. ZIPERSTEIN and JOSEPH A. LENTINI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 601 F.2d 281.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1979. A petition for rehearing was denied on July 11, 1979. The petition for a writ of cer-

tiorari was filed on August 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether pharmaceutical records given to the government by an employee of a medical clinic should have been suppressed as the fruit of an unlawful search and seizure.

2. Whether the district court abused its discretion in denying petitioners' motion for a severance.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted on one count of conspiracy to defraud the government, in violation of 18 U.S.C. 371, 31 counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of conducting an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c). Petitioner Ziperstein was sentenced to 30 months' imprisonment and a $10,000 fine on the conspiracy count and concurrent terms of two years' probation on the remaining counts, the probation terms to run consecutively to the term of imprisonment. Petitioner Lentini was sentenced to one year's imprisonment and a $1,000 fine on the conspiracy count and three years' probation on the other counts to run consecutively to the term of imprisonment. The court of appeals affirmed (Pet. App. A1-A25).

Petitioners and their co-defendants operated 28 medical clinics in Chicago, Illinois. Petitioner Ziperstein, who owned the clinics, together with the clinic administrators, one of whom was petitioner Lentini, implemented a scheme whereby they defrauded the federally funded Medicaid program by submitting false or inflated reimbursement claims for services allegedly provided by the clinics. Two billings organizations, also owned by Ziperstein, priced and processed the billings and sold them to factoring companies that collected the amounts charged from the State of Illinois (Tr. 266-269, 727, 731, 3723). Several techniques were used to inflate the amounts of the Medicaid reimbursements. Patients were sent to clinic doctors for unnecessary examinations (Tr. 444-445, 1737-1740, 2381); petitioners pressured clinic personnel to order laboratory tests regardless of medical necessity (Tr. 447, 638-640, 698, 953-954, 975, 1185, 1970-1971, 2002-2010, 2089, 2092, 2172, 2445, 2452, 2775, 3525, 3544-3551); clinic doctors, under pressure from clinic administrators, prescribed drugs for patients without conducting a physical examination and withheld drugs from drug addicts unless they submitted to additional laboratory tests (Tr. 1204-1205, 1736-1737, 2312-2326, 3275-3276); petitioners increased the number and quantity of prescriptions above that ordered by the physicians (Tr. 834, 1207-1210, 2146, 2951, 3061); and clinic pharmacy personnel billed Medicaid for the brand name drugs prescribed by physicians but actually dispensed less expensive generic drugs (Tr. 1212, 1866-1868, 2948).

ARGUMENT

1. Petitioner Ziperstein contends (Pet. 4-8) that documentary evidence of fraudulent prescription billings should have been suppressed because the government acquired that evidence in violation of his Fourth Amendment rights.

The facts do not support petitioner's contention. The documents in question were removed from the storage area of petitioner's clinic without government participation. In July 1976, Harlan Eisentraut, who was then employed as a pharmacist at one of petitioner's clinics, called the Federal Bureau of Investigation and told Agent David Kelly that he had documentary evidence of wrongdoing in connection with the filling of prescriptions at the clinic and that he wanted to bring the documents to the FBI office (Tr. 2734-2738). Agent Kelly expressed an interest in the documents (Tr. 2737), and two days later Eisentraut brought the documents to the FBI.[1] In denying petitioner's motion to suppress, the district court found that Eisentraut gained possession of the documents before he had any contact with the FBI and that he turned the documents over to Agent Kelly without any inducement by the government (Tr. 2755-2757, 2760-2762).

Even if Eisentraut's acquisition of the documents was improper, which is far from clear, suppression

[1] The documents included prescriptions filled by Eisentraut himself, prescriptions filled by others before Eisentraut began work at the clinic, and pre-stamped prescription forms.

was not required unless the government was involved in the impropriety. *Burdeau* v. *McDowell*, 256 U.S. 465 (1921); *United States* v. *Rodriguez*, 596 F.2d 169 (6th Cir. 1979); *United States* v. *Sor-Lokken*, 557 F.2d 755 (10th Cir.), cert. denied, 434 U.S. 894 (1977); *United States* v. *Haes*, 551 F.2d 767 (8th Cir. 1977); *McSurely* v. *McClellan*, 553 F.2d 1277 (D.C. Cir. 1976) (en banc), cert. dismissed as improvidently granted, 438 U.S. 189 (1978); *United States* v. *Sherwin*, 539 F.2d 1 (9th Cir. 1976); *United States* v. *Issod*, 508 F.2d 990 (7th Cir. 1974), cert. denied, 421 U.S. 916 (1975); *United States* v. *DeBerry*, 487 F.2d 448 (2d Cir. 1973). Here, Eisentraut's offer to provide the evidence to the FBI was not the result of prior negotiations between Eisentraut and the government, nor did Eisentraut obtain the documents as a means to gain any benefit from the government. The record amply supports the district court's finding that Eisentraut's removal of the documents was not the result of government inducement but was his private act, and the court therefore properly admitted the documents into evidence.

Petitioners' first question presented is similar to one included in the petitions for a writ of certiorari in *Walter* v. *United States*, cert. granted, No. 79-67 (Oct. 15, 1979), and *Saunders* v. *United States*, cert. granted, No. 79-148 (Oct. 15, 1979). See 79-67 Pet. 3, 17-23; 79-148 Pet. 2, 8-9. Nevertheless, we do not think it is necessary to hold the present petition until the final disposition in *Walter* and *Sanders*. In the first place, both the Fifth Cir-

cuit's decision challenged in *Walter* and *Sanders* and the Eighth Circuit's decision in *United States* v. *Kelly*, 529 F.2d 1365 (1976), on which petitioners in *Walter* and *Sanders* heavily rely, focus attention on the First Amendment concerns implicated in the government's acquisition of possibly protected forms of expression through an allegedly private search and seizure. No such First Amendment interest is or could be asserted by petitioners in this case in connection with the prescription forms obtained from Eisentraut. Second, the private party in *Walter*, after discovering and reporting the allegedly obscene character of the films shipped by the defendants, apparently received and followed instructions from the FBI to hold the films until government agents arrived and to attempt to obtain the name of anyone who might call to inquire about the shipment. See 79-67 Pet. App. 19 (Wisdom, J., dissenting). When one of the defendants later called the private party and made such an inquiry, the private party denied any knowledge of the shipment and informed the FBI of the call. *Ibid.* No such private action under government instruction is present in this case. Eisentraut's delivery of the incriminating documents to the FBI was entirely voluntary and not the product of government inducement and encouragement.[2]

---

[2] *Kelly* is further distinguishable from *Walter* and the present case, because there the government obtained the allegedly obscene materials from a common carrier to which the defendant had entrusted them. Arguably at least, a person's legitimate privacy interest in shipped materials is greater while they are in the possession of the carrier than after they have been mistakenly delivered to an unknown third party. The Eighth Circuit has recently declined to apply *Kelly* to facts similar to those of the present case. *United States* v. *Roberts*, No. 79-1396 (Nov. 13, 1979), slip op. 7-9.

Petitioner can prevail in this case only if *Burdeau* v. *McDowell*, *supra*, is overruled. We believe there is no reasonable possibility that this Court would do so in *Walter* and *Sanders*. Accordingly, whatever may be the resolution of the private search issue there, the government's acquisition of evidence here was proper, and further review is not warranted.

2. Petitioners also contend (Pet. 8-20) that they were denied a fair trial as a result of the district court's refusal to sever their trial from that of acquitted co-defendant Wu Win-Peng. The court of appeals' opinion (Pet. App. A3-A9), on which we rely, adequately demonstrates that petitioners have failed to show any abuse of the district court's discretion under Fed. R. Crim. P. 14.

Petitioners contend they were prejudiced by the manner in which Wu's counsel, Oliver, conducted his client's defense. They assert, first, that they were adversely affected by several of counsel's opening remarks and, second, that they were harmed by Oliver's cross-examination of nine government witnesses. Both contentions are insubstantial.

a. During his opening statement, Oliver referred to the death of unindicted co-conspirator Allen Ziperstein (Tr. 90); he did not reveal that Ziperstein had been murdered nor did he implicate petitioners in

Ziperstein's death. Oliver also stated that Wu was eager to testify because "an innocent man almost invariably is eager to take the witness stand" and "probably the more innocent he is the more anxious he is to testify in his own behalf" (Tr. 96). As the court of appeals noted (Pet. App. A6), that statement, which was merely an attempt to bolster Wu's credibility, did not constitute a prejudicial comment on the silence of the co-defendants. *United States* v. *Hutul*, 416 F.2d 607 (7th Cir. 1969), cert. denied, 396 U.S. 1012 (1970). Furthermore, the jury was adequately instructed that no presumption of guilt arises from a defendant's silence and indeed was told that it could not even discuss the subject during its deliberations (Tr. 5801). See *United States* v. *Sacco*, 563 F.2d 552, 555 (2d Cir. 1977), cert. denied, 434 U.S. 1039 (1978). Petitioners also claim prejudice from Oliver's intimation that certain defendants had attempted to tamper with witnesses (Tr. 96). Counsel's remark was supported by evidence presented at trial to the effect that petitioner Ziperstein had intimidated two witnesses (Tr. 980-981, 3866), and therefore the reference in the opening statement was justified.

b. With respect to petitioners' complaints about the cross-examination conducted by Oliver, the court of appeals correctly stated that "[t]he objections need not be specifically detailed since they all possess a common characteristic: each of these questions was allegedly prejudicial because they reiterated some point which the government had already made con-

cerning the conspiracy" (Pet. App. A6). Oliver's questioning comprised a series of attempts to demonstrate that his client was only peripherally associated with the management of the clinics and therefore was at most minimally involved in the conceded criminal enterprise. For example, Oliver's questioning of Michael Morgan (see Pet. 13-14) emphasized Wu's ineffective use of the English language, thus minimizing his managerial role (Tr. 341-346). Oliver also questioned witnesses Jordan and Armstrong concerning the source of the clinics' policies regarding unnecessary or harmful laboratory tests (Tr. 1488, 2268, 2677) and succeeded in establishing that his client was not responsible. In any event, petitioners point to no instance in which Oliver introduced incriminating evidence against them when that evidence had not already been legitimately produced by the government. Accordingly, the court of appeals correctly concluded that Oliver's cross-examination of government witnesses did not deny petitioners a fair trial.[3]

---

[3] Petitioners' contention (Pet. 17) concerning Oliver's closing argument is not supported by the record. Oliver specifically requested the jury to return a not guilty verdict as to all defendants and strenuously argued for that result (Tr. 5721-5724). As the court of appeals found (Pet. App. A9), Oliver's reference to the actions of Ziperstein and Lentini were amply supported by the record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1979

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Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO THE BRIEF IN OPPOSITION FILED BY THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether this petition presents an example of an impermissible seizure . . . where Petitioners' employee stole records (and unopened mail) from a private premises and then, after consulting with the Department of Justice, turned the records and unopened mail over to the United States Attorney?

2. Whether the above facts bring this Petition within the parameters of *Walter* [*and Sanders*] v. *U.S., cert. grted,*. 100 S.Ct. 227 (1979)?

CONSTITUTIONAL PROVISIONS

Fourth Amendment, United States Constitution:

AMENDMENT [IV.]

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF PERTINENT FACTS

As relating to the only issue and argument proffered in this reply brief we suggest that *inter alia,* the trial evidence showed that from September, 1975, to and including July, 1976, the Petitioner had in his employment a pharmacist named Harlan Eisentraut. His trial testimony is, in part, as follows:

> He is a pharmacist. From August or September, 1975, to July 31, 1976, he worked at three pharmacies in clinics associated with Eugene Ziperstein (Tr. 2735).

> On July 29, 1976, while working at County Family Medical Center, he called the Federal Bureau of Investigation and spoke to Agent Kelly. He told Kelly he had evidence and knowledge of wrongdoing. "Well, at that time I had knowledge that prescriptions I had filled, the quantities or integrity had been increased and then I found at 11:35 Saturday night quite a supply of signed Welfare prescriptions not dated by one or probably three different doctors." (Tr. 2736).
>
> These documents were in a storage room in the clinic. Kelly said he was interested in it and wanted to see it (Tr. 2737). Eisentraut wanted to bring the documents to Kelly and Kelly agreed he should bring them to the Federal Building (Tr. 2738).
>
> On July 31, 1976, Eisentraut brought the documents to Mr. Conlon's office. These consist of Government Group Exhibits 201-A, 201-B, 206-A, 206-B, 206-C 206-D and 206-E as well as many other prescriptions filled out in the clinics before he began working there (Tr. 2741). He brought in about 200 pre-stamped prescriptions signed by Dr. Guthrie (Tr. 2743).
>
> He did not get Mr. Ziperstein's permission to take the documents (Tr. 2744). He also took some unopened mail from the pharmacy (Tr. 2745).
>
> Mr. Conlon gave him back the letters. He started a new job the next day (Tr. 2746).
>
> He was very much aware there was an investigation going on and the documents would have a bearing on it. He told this to Agent Kelly. Two FBI agents had been out to talk to him previously but he had not talked to anyone from the FBI or U.S. Attorney's office before July 29, 1976 (Tr. 2747-48).

The testimony and evidence offered by the government during the suppression hearing included the testimony of F.B.I. Agent David Kelly and an affidavit by government

trial counsel, William F. Conlon.[1] The testimony of Agent Kelly included, in part, that late on the night of July 29 or July 30, he returned a phone call to Harlan Eisentraut, who related that he was a pharmacist working for Mr. Ziperstein and had information concerning Ziperstein that he wanted to relate to the F.B.I. (Tr. 2749-50). He set up an appointment for Eisentraut with Mr. Conlon. He told Eisentraut to bring any information he had; he does not specifically recall telling Eisentraut to bring any documents with him (Tr. 2750). He does not recall whether Eisentraut said he had documents relating to Ziperstein (Tr. 2751). He told Conlon an individual named Harlan Eisentraut had contacted the office and had information concerning his employment with Eugene Ziperstein (Tr. 2752). He does not recall mention of Dr. Guthrie or blank prescriptions in talking to Eisentraut (Tr. 2752).

The affidavit of the U.S. Attorney stated, in part, that *Eisentraut* indicated "that he was turning over the documents voluntarily and that he had authority to remove the documents he had brought forward and that they were properly in his custody and control" (R. 75, pg. 6). The same affidavit then goes on as follows:

> "I advised Mr. Eisentraut that the rubber stamps, unopened correspondence, and other documents should be returned to the pharmacy since I could not ascertain that there was possible evidence of any criminal misconduct" (R. 75, pg. 6-7).

The trial court saw fit to comment, at the end of the suppression hearing, "it may be wrong to take them out of the clinic and deliver them to the F.B.I." (Tr. 2735).

The saga really comes into focus when one considers the scenario of events. The employee, Eisentraut, saw the

[1] The affidavit of A.U.S.A. Conlon is reproduced in the original record at R. 75, pp. 5-7.

documents in a storeroom on a Saturday night (July 29, 1976) at about 11:35 p.m. These documents included, *inter alia*, pre-signed [by doctors] blank prescriptions (Tr. 2763). On this same Saturday night Eisentraut had telephonic contact with Agent Kelly and some of the items were described by Eisentraut to the Agent (Tr. 2736). The documents (records) were in a storage room and these were not documents or records that Eisentraut had worked on during the ordinary course of his duties. The documents were not *STOLEN* until after F.B.I. Agent Kelly told Eisentraut he was interested in the evidence and wanted to see it and until *after* Agent Kelly urged that Eisentraut should bring the documents to the Federal Building (Tr. 2738). *The produced documents permeate[d] the trial.* The documents, which were brought by Eisentraut to the U.S. Attorney's Office on July 31, 1976, included several hundred prescriptions including, approximately two hundred (200) pre-stamped prescriptions signed by Dr. Guthrie (Tr. 2741, 2743). It is uncontested that petitioner gave no permission to either look at or seize the records (Tr. 2744). Petitioner also urges that the Court make note that Eisentraut was not an innocent "passerby". Eisentraut was very much aware of the fact that there was an on-going investigation and that these records played a part in that investigation (Tr. 2747-49). Petitioner represents that the facts herein detailed fall within the parameters of *Walter* v. *U.S.*, cert. granted, 100 S.Ct. 227 (October 15, 1979).[2]

[2] The Court also granted certiorari in *Sanders* v. *U.S.*, #79-148. Both *Walter* and *Sanders* were jointly tried and convicted (Cf., *U.S.* v. *Sanders*, 592 F.2d 788 (C.A. 5, 1979); on denial of rehearing, 597 F.2d 63 (C.A. 5, 1979).) *Sanders* v. *U.S.*, is cited at 100 S.Ct. 227 (October 15, 1979). In the *Sanders* Petition for Certiorari (#79-148) Questions 2 and 3 offer "similar search" and seizure questions (25 Cr.L. 4164). Thus, the instant petition falls squarely within the parameters of *Walter* and *Sanders*.

ARGUMENT

The record in petitioner's case eloquently reveals that an individual intimately exposed to a government investigation [Eisentraut] stole records and unopened mail after conversing with an F.B.I. Agent during the evening hours of July 29, 1976. Eisentraut, had not taken anything before talking to F.B.I. Agent Kelly. After Eisentraut was told that the agent was interested and wanted to see the evidence . . . Eisentraut then brought to the office of the U.S. Attorney stolen items which included, *inter alia,* "unopened mail". Thus, the F.B.I. and the U.S. Attorney accepted property . . . stolen . . . but not stolen until after the F.B.I. said they were interested in the evidence. The U.S. Attorney upon seeing that the stolen items included unopened mail . . . caused the mail and other non-usable items to be returned (R. 75, pg. 6-7). With this in mind the government, in their brief in opposition, offers the theory that certiorari should *not* be granted because "we believe there is no reasonable possibility that this Court would do so in *Walter* and *Sanders* [overrule *Burdeau* v. *McDowell,* 265 U.S. 465 (1921)] (Gov. Brf., pg. 5).

The first question presented in the *Walter* Petition for Certiorari is:

> "Was FBI's acceptance from third party of films, which allegedly were wrongfully in that party's possession, subject to Fourth Amendment warrant requirement, or alternatively, does rule fashioned fifty years ago in *Burdeau* v. *McDowell,* 256 U.S. 465, require two-step analysis of 'seizure'—that by third party and that by government—in case in which First Amendment concerns are involved?"[3]

[3] *Walter* v. *U.S.*, Petition for Certiorari, #79-67, 25 Cr.L. 4160-4161.

In petitioner's case the Court of Appeals, while affirming petitioner's conviction used *Burdeau* while assuming for the sake of their decision that even had Eisentraut been without authority to take the records . . . *Burdeau* compelled affirmation of the conviction (601 F.2d at 290).

A glaring fault in the Court of Appeals' reasoning is their misunderstanding of the transcript. The Court of Appeals assumed that Eisentraut gained possession of the documents BEFORE CONTACTING THE GOVERNMENT AND THAT HE TURNED THEM OVER WITHOUT GOVERNMENT INDUCEMENT (601 F.2d at 290, emphasis ours). *The transcript is quite to the contrary.* As we have pointed out in our Statement of Facts, *ante,* Eisentraut called the F.B.I. at 11:35 p.m. on a Saturday night and the F.B.I. Agent wanted to see the evidence and encouraged Eisentraut to produce it the following Monday . . . which Eisentraut did. Eisentraut himself, was one of several persons then under investigation. The plot goes further in that amongst the things that Eisentraut stole and turned over to the F.B.I. was unopened mail which . . . the United States Attorney directed be returned. The government, at page 5 of the brief in opposition, perpetuate the error in facts by asserting:

> "No such private action under government instruction is present in this case. Eisentraut's delivery of the incriminating documents to the FBI was entirely voluntary and not the produce of government inducement and encouragement". (Gov. Bfr. pg. 5).

While the government suggests that certiorari be denied in this case because the government finds there is no reasonable possibility that this Court will overrule *Burdeau* (Gov. Brf. pg. 5) the criticism of *Burdeau* is not without merit. As Circuit Judge Wisdom points out in *U.S.* v. *Sanders:*

"*The Burdeau rule has spawned much critical literature.* Today, the Court extends that rule into an area where the constitutional requirements of the fourth amendment are to be 'accorded the most scrupulous exactitude'. *Stanford* v. *Texas,* 1965, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431. Placing the government's acceptance of expressive materials outside the scope of the fourth amendment, by 'cast[ing] the government in the role of a passive receiver . . . absolve[s] the government of any first amendment responsibilities or restrictions . . . [It] allows for the possibility of government-sanctioned private censorship without judicial supervision.' Note, Private Searches and Seizures, supra at 467. In short, the majority rule frustrates the Supreme Court's efforts to utilize the fourth amendment as a source of procedural guarantees aimed at controlling governmental action that affects freedom of expression. The approach of the Eighth Circuit Court of Appeals in *Kelly,* which subjects the government's taking of expressive materials discovered in a private search to the scrutiny of the fourth amendment, properly guards both the first amendment rights and the privacy interests of absent third parties." (592 F.2d at 804).[4]

The complexity of the "private search" doctrine has caused the Circuits to split . . . in an effort to reduce the force and effect of the *Burdeau* decision. For example, in *U.S.* v. *Haes,* 551 F.2d 767 (C.A. 8, 1977), the Court reverses an obscenity conviction with directions that a motion to suppress be granted finding, *inter alia:*

> "The courts have engaged in a two prong analysis of 'allegedly' private searches, however, separately analyzing the search aspect apart from the actual seizure in order to determine whether there was sufficient

[4] Judge Wisdom likens the seizure by the government after the private search to *Chadwick* violations (*U.S.* v. *Chadwick,* 433 U.S. 1 (1977) ; 592 F.2d at 804). At 592 F.2d 804, n. 10, Judge Wisdom points out a string of authorities that have criticized the *Burdeau* private search concept.

> *governmental participation in either aspect to require fourth amendment protection.* See *United States* v. *Sherwin,* 539 F.2d 1, 6-7 (9th Cir., 1976), *United States* v. *Kelly, supra,* 529 F.2d at 1371. Thus, as in *Sherwin* and *Kelly,* when the search was held to be a private search, the inquiry then focused on the nature of the seizure and whether it passed constitutional muster" (551 F.2d at 770; empsasis supplied).[5]

The Supreme Court of Montana in *State* v. *Helfrich,* ..... P.2d ....., decided October 3, 1979, 26 Cr.L. 2092, relied on the state Constitution's provisions on the right of privacy and search and seizure, and refused to use the private search doctrine of *Burdeau* v. *McDowell,* 256 U.S. 465 (1921) to justify a warrant based on evidence seized through a private party's trespass of the defendant's back yard.

In sum, our petition presents a rather startling collection of facts. An individual pharmacist, himself the subject of some investigation, undertakes a search in an area which does not fall within his ordinary pharmaceutical duties (searching a storeroom). Post-search he conveniently calls the F.B.I. (at 11:30 p.m. on a Saturday night). The F.B.I. agent, making no effort to secure any warrant of any kind to search this storeroom, urges the psuedo-defendant to bring the evidence in. The seizure (illegal in our view) is not completed until the United States Attorney on July 31, 1976, is presented with what was stolen from the storeroom on July 29, 1976. But for the F.B.I. agent's urging that the records be stolen from the storeroom . . . the government would have been without the evidence (unless, of course, they had gone about getting a search warrant). It is with more than passing interest that we reproduce a few lines from the government's brief in opposition:

[5] In *Haes* Circuit Judge Webster dissented, urging that there was no violation of the fourth amendment in either the search or seizure (551 F.2d at 772-4).

> "Accordingly, whatever may be the resolution of the private search issue there (speaking to *Walter* and *Sanders*), the government's acquisation of evidence here was proper, and further review is not warranted" (Gov. Brf. pg. 5-6).

Earlier, the same brief in opposition states:

> "Petitioners' first question presented, however, is similar to one included in the petitions for a writ of certiorari in *Walter* and *Sanders*" (Gov. Brf. pg. 4).

Petitioner views these contradictions as an invitation to review that which occurred in this case . . . with the hope that the Court does not grant review. Under such circumstances it is respectfully submitted that the granting of certiorari is here appropriate.

CONCLUSION

The petitioners, Eugene A. Ziperstein and Joseph A. Lentini, file no reply to the government's severance argument. The petitioners are content to rely on their opening petition as relating to severance *vel non*. The "search and seizure question" presents a situation of exceptional importance in the administration of criminal justice. Therefore, it is respectfully urged, that the instant petition for certiorari be granted and this case be joined with the consolidated cases of *Walter* and *Sanders* v. *U.S.*, cert. granted, 100 S.Ct. 227 (October 15, 1979).

Respectfully submitted,

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